Nos. 18510 to 18533, 18866 to 18872

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED AIR LINES, INC.,

Appellant,

vs.

JANICE WIENER, *et al.* (24 cases); CATHERINE B. NOLLENBERGER, *et al.* (7 cases); UNITED STATES OF AMERICA (31 cases),

Appellees.

REPLY BRIEF OF APPELLANT UNITED AIR LINES, INC.

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REPLY BRIEF OF APPELLANT UNITED AIR LINES, INC.

This brief is written in response to the appellees' briefs filed, respectively, by the Government and by the plaintiff-appellees. Following the pattern of United's Opening Brief, we will first treat of the points attempted to be made by the Government.

Summary of the Argument.

The case of United against the Government with reference to reckless or willful misconduct is first discussed. It is noted in this connection that nowhere does the Government deny that the facts proven and found at trial would have justified findings of reckless or willful misconduct against it. Rather, the Government takes refuge behind the fact that the District Court found it guilty of no more than active and proximately causative negligence. Further, it is the claim of the Government that this Court is without power to correct this situation.

In answer to these claims by the Government, it is pointed out that the findings of the District Court negativing reckless or willful misconduct are clearly erroneous and are correctible upon these appeals because they are against the clear weight of the evidence and were induced by an erroneous view of the law applicable in such cases. The powers of appellate courts in such circumstances are then discussed, followed by the corollary to United's main point: that if, on the record, the Government was guilty of reckless or willful misconduct, any ordinary negligence on the part of United, if any there was, would not bar the latter's right to indemnity from the Government.

There is next taken up the question of error on the part of the District Court, in the 9 Government employee cases, in refusing to allow United to seek relief over as against the Government, contrary to the combined effect of the holdings in the cases of *Weyerhaeuser and Treadwell Construction Co.* against the *United States,* 372 U. S. 597, 772 which so interpret Section 7(b) of the Federal Employees' Compensation Act as to permit such relief in favor of parties in the position of United.

Attention is next given to the contentions of the Government and of the plaintiff-appellees with reference to the claimed sufficiency of the evidence to support the findings of negligence on the part of United. It is pointed out that the thesis of the parties in question that the Air Force jet engaged in an evasive maneuver to avoid the approaching DC-7 merely fortifies United's right to indemnity against the Government by bringing into play the applicability of the doctrine of the last clear chance, which is discussed in relation to the facts relied upon by such parties. It is also pointed out that under the concept of pre-collision evasive ma-

neuvers on the part of the jet, any negligence on the part of the United crew, if any there was, was surely passive, with the result that United would be entitled to indemnity by reason of the active negligence, or worse, on the part of the Air Force, irrespective of the applicability of the last clear chance doctrine.

It is next pointed out that the pre-collision acts and omissions charged to United, if they be regarded as being negligent at all, were remote from the standpoint of causation as to all adverse parties and in any event did not constitute breaches of any duty owed the Government.

Next there is taken up the subject of error in the instructions of the District Court with reference to *res ipsa loquitur;* first, for failing to instruct as to the necessity of exclusive control of the injuring instrumentality under applicable (Nevada) law and second, due to the absence of such element of exclusive control, for giving any instruction on the subject at all. Discussion is then had with reference to the conflict of laws problem as between the forum (California) and the *lex loci* (Nevada). It is pointed out that California applies the *lex loci* as to the sufficiency of a complaint setting forth a cause of action upon a foreign statute, from which it follows that the sufficiency of the evidence to sustain such a foreign statutory cause of action would ex necessitate be tested by the foreign law in order to ascertain if the plaintiff had proven, as well as alleged, himself within such foreign statute.

It is next shown that, contrary to the contention of the plaintiff-appellees, Nevada has not, as has California, abandoned the element of exclusive control in *res ipsa* cases.

There is next discussed the error of the District Court in granting plaintiffs' motions for summary judg-

ment as to the issue of liability in the 7 Nevada cases. It is pointed out that the judgments in the *Wiener* cases, relied upon as creating a collateral estoppel upon which the motions for summary judgment were predicated, were in effect California judgments which, due to the appeals therefrom, lacked the finality necessary to render them available as a basis for collateral estoppel; and that California, not federal or Nevada, law governed in this connection. It is also pointed out that the motions for summary judgment were not sustainable on any theory of the applicability of *res ipsa loquitur,* and, more importantly, it is to be noted that the plaintiff-appellees concede that if the *Wiener* judgments are reversed, the 7 Nevada judgments should be reversed also.

Lastly, there is taken up the matter of the action of the District Court in increasing, in two of the Nevada cases, the amounts of the general verdicts. This, it is pointed out, constituted a misuse of the special interrogatory process and an improper additur within the intendment of the Seventh Amendment. In tort unliquidated damage actions, such as those brought for personal injuries or, as here, for wrongful death, there is no prescribed measure of damages such as, for instance, in breach of contract cases: the difference between the contract price and the market price, or as an alternative, the cost to the plaintiff of attaining the object of the contract in the event of breach. On the contrary, in cases such as the present, the question of what is fair and just pecuniary compensation to the heirs and next of kin of the decedent is left to the sound discretion of the jury, predicated upon their consideration of relevant evidentiary matters such as life expectancy, earning capacity and the like. Here the jury took into consideration such relevant matters and returned their verdicts, which turned out to be less

than what they would have been had the jury treated each of such evidentiary matters as being *conclusive*. In these circumstances the District Court increased the amount of the verdicts in the two cases by the process of treating the answers of the jury to interrogatories dealing with such evidentiary material as being conclusive, thus reducing the matter of ascertaining the general damages to a matter of mere mechanical mathematical computation. It is shown that this method of treating the evidentiary material was erroneous and not justified by any of the authorities cited by appellees, none of which relates to a situation where, as here, the matter of general damages is left to the sound discretion of the jury in the light of evidentiary matter which they may take into consideration, but which they are not bound to regard as conclusive. The conclusion is that the District Court invaded the province of the jury in contravention of the Seventh Amendment and that there was, in law, no inconsistency as between the special interrogatories and the general verdicts within the intendment of Rule 49(b) of the Rules of Civil Procedure.

I.

This Court May Properly Hold That, Upon the Findings and Upon the Facts Proven, Without Substantial Conflict, the Government Was Guilty of Reckless or Willful Misconduct.

It is highly significant that nowhere in its appellee brief does the Government deny that the facts proven and found at trial would have justified an ultimate finding of reckless or wilful misconduct on its part. Instead, it takes refuge behind the fact that the District Court found that its negligent acts were not willful, wanton or intentional and that the same constituted no more than active and proximately causative negligence. (F. 85, 86; Government's Opening Brief, Appendix A-p. 26.) And in this connection the Government wholly

misconceives our position when it mistakenly asserts that United does not claim that the District Court acted upon a misapprehension of the law and that United is actually seeking to have this Court reweigh the evidence and make new findings.

In United's opening brief we pointed out that while the District Court was correct in finding the Government guilty of *at least* active and causative negligence, it erred in failing to find and to conclude that the Government was, in fact, guilty of reckless or willful misconduct. And case after case was cited to the point that one who endangers the lives or safety of others by intentional or reckless conduct in disregard of such lives or safety, or of his own, is guilty of reckless or wilful misconduct. The Government claims that this Court is without power to correct this situation. In so claiming, it is clearly wrong.

We say this for the reason that it is well settled that a federal Court of Appeals has power to set aside a finding by a trial court where the same is without substantial support to sustain it *or* where it is against the clear weight of the evidence *or* where it is induced by an erroneous view of applicable law. *United States v. Gypsum Co.,* 333 U.S. 364, 394, 395, rule applied as regards an erroneous misconception of the law; *Smallfield v. Home Ins. Co. of New York,* 9 Cir., 244 F.2d 337, 341, to the same effect, holding a finding to be clearly erroneous even though supported by the evidence; and see, also, *Cleo Syrup Corp. v. Coca-Cola Co.,* 8 Cir., 137 F.2d 416, 418; *Sanders v. Leech,* 5 Cir., 158 F.2d 486, cited in *Smallfield* opinion of this Court; *State Farms Mutual Auto Assn. v. Bonacci,* 8 Cir., 111 F.2d 412; *Koenig v. Arnold,* 8 Cir., 82 F.2d 85; *Fleming v. Palmer,* 1 Cir., 123 F.2d 749; *United States v. State St. Trust Co.,* 1 Cir., 124 F.2d 948.

A. The Finding of the District Court Negativing Reckless or Willful Misconduct on the Part of the Government Are Clearly Erroneous and Correctible Upon These Appeals Because (a) They Are Against the Clear Weight of the Evidence and (b) They Were Induced by an Erroneous View of the Law Applicable in Such Cases.

Here the two separate grounds just stated, each of which warrants the setting aside of the findings negativing reckless or willful misconduct, are clearly present. The evidence and the other detailed findings clearly establish what the Government does not deny: that the dispatching of what amounted to a high-speed projectile, without adequate lookout safeguards and in disregard of Civil Air Regulations and Air Force orders,* into a heavily traveled commercial airway meets every test properly applicable to establish reckless or willful misconduct on the part of the Government as a matter of law. (See discussion and authorities in this regard in United's Opening Brief at pp. 43-46.) In a word, the District Court's findings that the Government was guilty of no more than ordinary negligence, active though such negligence was, is against the clear weight of the evidence establishing the greater fault.

So, also, the failure of the District Court properly, by appropriate findings, to characterize the acts of the Government, per the Air Force, as reckless or willful, reflects an erroneous misconception of the law applicable to such tortious conduct which is plainly correctible

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*Preoccupation of the instructor pilot with cockpit duties, for instance, was not compensated for as required by CAR §60.12(c): Exhibit G-5; and for discussion of Air Force orders with reference to the minimization of potential air collision hazards and of conflict with traffic on civil airways and with reference to maximum use of outlying facilities, see United's appellee brief on Government's appeals, pp. 16-20.

on appeal. As was said in *United States v. Gypsum Co., supra,* 333 U.S. 364:

> "In so far as Finding 118 and the subsidiary findings were based by the District Court on its belief that the *General Electric* rule justified the arrangements or because of a misapplication of *Masonite* or *Interstate Circuit,* errors of law occurred. These we can, of course, correct. . . . A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (333 U.S. at 394-395.)

Nor is the Government's concern that we are asking *this* Court to make overriding findings justified. An appropriate procedure, heretofore sanctioned by this Court, would be to vacate the judgment denying indemnity to United and remand with directions to the District Court to make appropriate findings as to reckless or willful misconduct on the part of the Government. See *Smallfield v. Home Ins. Co. of New York, supra,* 244 F.2d 337, 341; and see for further authority on the power of an appellate court to correct error on the part of a trial court in treating as mere negligence activities which in law constitute reckless or willful misconduct, *Alabam Freight Lines v. Phoenix Bakery, Inc.,* 64 Ariz. 101, 166 P.2d 816 and *Missouri, K. & T. Ry. v. Missouri Pac. Ry.,* 103 Kan. 1, 175 Pac. 97.

The corollary to a holding by this Court that the Government was, on the record, guilty of reckless or willful misconduct would be that any ordinary negligence on the part of United, if any there was, would not bar the latter's right to indemnity from the Government. See discussion in United's Opening Brief, pp. 38-48.

We next turn to the propriety of the District Court's refusal to allow United to seek relief over against the Government in the nine Government employee cases.

II.

The District Court Erred, in the Nine Government Employee Cases, in Refusing to Allow United to Seek Relief Over Against the Government.

This subject was covered in United's Opening Brief at pages 60-64, where it was pointed out that the combined effect of the decision of the Supreme Court in *Weyerhaeuser v. United States,* 372 U. S. 597, and its per curiam opinion in *Treadwell Constr. Co. v. United States,* 372 U.S. 772, was to negative any claim that Section 7(b) of the Federal Employees' Compensation Act, 5 U.S.C. §§ 751 *et. seq.,* 757(b) precluded any liability over of the Government by reason of an injury to an employee covered by that section.

The Government denies this; and preliminarily it asserts that in any event two of the decedents in question were servicemen and hence liability over against the Government did not lie for that reason, mentioning *Feres v. United States,* 340 U.S. 135 and *Rhoades v. United States,* 216 F. Supp. 732 in this connection. This latter citation has reference to the opinion of the District Court below in the instant cases, wherein, on the authority of the Circuit decisions in the *Weyerhaeuser* and *Treadwell* cases and without reference to any question of military status, United was denied the recourse against the Government generally in the Government employee cases which it here complains of. Since the two Circuit decisions in question were reversed by the Supreme Court as above noted, everything said in United's Opening Brief on the present subject has full application to what was said in the *Rhoades* opinion.

As for *Feres v. United States, supra,* 340 U.S. 135 that case denies the right of the serviceman's personal representative to proceed against the Government where the injuries to plaintiff's decedent are sustained while the latter is on active duty, which appears to have been the case here.* However, the present situation is not governed by the solution of the question as to whether or not the injured serviceman or his heirs, executors. administrators or assigns may sue the Government directly. The question here is whether or not one exposed to liability to a government employee, *whether or not such employee or his heirs, personal representative or assignees may themselves sue the Government directly,* may himself recover over against the Government for the liability cast upon him by the Government's wrongful act in injuring the serviceman or other employee in the first place. The answer to this question brings us once again to the proper interpretation of Section 7(b) of the Federal Employees' Compensation Act, for as the *Feres* opinion points out, 340 U.S. at 138, military personnel are subject to the provisions of that act, 28 U.S.C. §2671, which necessarily includes those of Section 7(b).

Section 7(b) provides that the liability of the Government under the Compensation Act shall be exclusive and in place of all liability of the Government "to the employee, his legal representative, spouse, dependents, next of kin and *anyone otherwise entitled to recover damages from the United States on account of such injury or death.*** . . ."

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*Cf. *Brooks v. United States,* 337 U. S. 49, upholding the right of the serviceman or his personal representative to proceed against the Government where the injuries are sustained other than in the line of duty.

**Emphasis here, as elsewhere, is supplied unless otherwise noted.

The effect of the *Weyerhaeuser* and *Treadwell* decisions of the Supreme Court is to interpret these provisions of Section 7(b), *ejusdem generis,* as not debarring *unrelated third parties* from suing the Government even though the injured employee and the others of the category enumerated in the section are debarred by the section from doing so. Hence it matters not that the decedents Paris and Darmody were members of the Armed Forces, since the right of United to recover over as against the Government in their case was precisely the same as its right in the case of any other Government employee.

The Government, with all respect, makes a number of contentions, all founded in expediency, in attempting to avoid United's point that the combined effect of the Supreme Court's decisions in *Weyerhaeuser* and *Treadwell* is to establish the right of one in the position of United here to recover over against the Government. In answer to these, we need add but one thought to what was said on the present subject in United's Opening Brief. It is this: There was no reason in the world why the Supreme Court would have vacated the Circuit decision and remanded *Treadwell*—a non-admiralty case—to the District Court for further consideration in the light of its decision in *Weyerhaeuser* other than to indicate to the District Court that its holding in *Weyerhaeuser* should be controlling. And that holding, so far as a general tort action—*Treadwell*—is concerned was that in enacting Section 7(b) "There is no evidence whatever that Congress was concerned with the rights of unrelated third parties* . . .", which is to say parties in the position of United here. It follows that the District Court erred in denying United the right to recover over against the Government in *all* of the Government employee cases, including Paris and Darmody.

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*372 U. S. at 601.

The balance of the points raised by the Government have to do with the claimed sufficiency of the evidence to support the findings as to negligence on the part of United. The plaintiff-appellees make substantially similar contentions in regard to support for the jury verdicts against United. In these circumstances, these parallel contentions will be treated together.

III.

The Thesis of Appellees That the Jet Engaged in an Evasive Maneuver to Avoid the Approaching DC-7 Merely Fortifies United's Right to Indemnity Against the Government.

Both the Government and the plaintiff-appellees covertly attack the finding* of the District Court (73: Government's Opening Brief, Appendix A - p. 25) that the pilots of the jet negligently failed to *see,* as well as to avoid, the DC-7. They do this in response to United's point, made in its opening brief (p. 53 *et seq*), that due to limitations upon the range of vision upward of the DC-7 pilots (some 10° above the horizontal) that they could not see the jet as it descended upon them. The angle of descent of the F-100F at the time of impact, it will be recalled, was 17°. (F. 36: Government's Opening Brief, Appendix A - p. 14.)

Appelllees attack the finding that the jet pilots did not see, as well as avoid, the DC-7, on the thesis that the normal angle of descent under the KRAM procedure was some 5°; that descending at this rate the jet crew, at some indeterminate point and time prior to the collision, *did* see the DC-7 approaching at a level below them and then embarked upon an evasive maneuver to avoid the airliner.

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*In an ostensible attempt, we assume, to sustain the judgments, not to overthrow them. Cf. *Story Parchment Co. v. Paterson Co.,* 282 U. S. 555, 560.

This maneuver, according to appellees, consisted of a 90° bank *downward* which increased the angle of descent of the jet from 5° to 17° at point of impact. From this they drew the conclusion that the jet was in full view of the DC-7 at all times.

The District Court, as noted, did not agree with the proposition that the jet saw the DC-7. Furthermore, as against the appellees' underlying assumption that the jet was performing a normal 5° descent along the prescribed KRAM path, the District Court found (33: Government's Opening Brief, Appendix A - p. 13) that the jet *never got on the path prescribed by the KRAM procedure;* that the course of the jet vacillated from easterly over KRAM to westerly over KRAM, then to airspace northwesterly of the center line of Victor 8 airway and thence to a point southeasterly of the Victor 8 center line, where the collision occurred. Any attempt under this finding, which is not attacked, to import regularity of flight or a continuous line of approach or a regularity of rate of descent on the part of the jet to the path of the DC-7 is wholly unjustified. The short of it is that the jet was being flown off course by a student pilot who was unfamiliar with the type of aircraft which he was flying blind, under the simulated instrument let-down procedure. (F. 16: Government's Opening Brief, Appendix A - p. 7.)

However, to test the argument of appellees, let us assume the verity of evidence indicating that the jet *did* see the DC-7 and *did* engage in an evasive maneuver in an attempt to avoid impact. The fact is that such evidence fully supports the validity of United's claim for indemnity against the Government, as we shall see in following the appellees' theory in the present regard to its proper conclusion. Cf. *Sudden Lumber Co. v. Blue Diamond Co.,* 125 Cal.App. 545, 553, 13 P.2d 958.

A. The Evidence as to the Pre-Collision Change of Course by the Jet, Upon Which Both the Government and the Other Appellees Rely, Establishes That the Air Force Instructor-Pilot Negligently Failed to Avail Himself of the Last Clear Chance to Avoid the Collision.

As will have been noted, and in order to negative the effect of the found 17° angle of descent of the F-100F at time of impact, the respective appellees are at some pains to show that the jet was descending at a 5° angle until it increased that angle—downward—to 17° by a pre-collision maneuver. At a 17° angle of descent, as the plaintiff-appellees point out (Brief, p. 13), the jet would have descended somewhere in excess of 10,000 feet a minute, which means some 167 feet per second. So that when the jet's vapor trail "swooped down" as the witness Allen White put it (45 Rep.Tr. 5998), the jet, we now assume, for the first time embarked upon a curving and rapidly and continuously increasing angle of descent which led to the collision. In other words, the two planes were not on a collision course prior to the initiation of the jet's downward maneuver.

Other pertinent factors are to be noted. The *nature* of the maneuver was to throw the jet into a 90° bank which placed the wings of the jet in a position perpendicular to the plane of the wings of the DC-7 at time of impact. (For the geometry of the collision, see Exhibit U-48-A, received at 42 Rep. Tr. 5615.) The full wing spread of the jet, in this vertical posture of its wings, thus constituted a threat to the level-flying DC-7, which was not true prior to initiation of this deadly "evasive" maneuver. Further, it is to be noted that the path of the maneuver was not *up and away* from the path of the air liner, but instead *down and into the path of the DC-7.* According to the Government (Brief p. 13), the 90° bank which increased the jet's

angle of descent from 5° to 17° at time of impact was one which "produces a 'drop' or, if the aircraft is already in a descending attitude, as was the F-100F, the angle of descent would rapidly and continuously increase."

Implicit in the thesis of appellees is the proposition that the jet was descending at a 5° angle of descent prior to the institution of its evasive maneuver downward. Admittedly, on this hypothesis, it was *above* the DC-7 at all times prior to the institution of such maneuver, for the collision only occurred *after* it went into its bank and "rapidly and continuously" increased its angle of descent. Thus its downward plunge was likened by the witness Bisplinghoff, upon whose testimony both appellees rely, to an "outside loop"—one which involved a flight path curvature where the pilot is *outside* of the curved path. (43 Rep.Tr. 5694.) In this regard the following testimony of the same witness is most significant:

> "Q. (By Mr. Rotchford) Now to be doing that [executing a curved flight analogous to an outside loop] at the moment of impact the F-100F pilot would be curving into the wingtip instead of away from it, is that right, sir? A. This would be right.
>
> Mr. Belcher: Wait a minute. Curving into the wingtip?
>
> Mr. Rotchford: Curving into the wingtip instead of away from it.
>
> Mr. Belcher: Wingtip of what, of the DC-7?
>
> Mr. Rotchford: Of the DC-7." (43 Rep.Tr. 5694-5695.)

So, also, it is to be noted that the pilot who initiated the maneuver (the student-pilot, it will be recalled, was under a hood and could not see) was an experienced

Air Force instructor-pilot (F. 16: Government's Opening Brief, Appendix A - p. 7); one who could be reasonably expected to react promptly in the event of an emergency. And, while we do not know the exact time when he sighted the DC-7, under the hypothesis advanced by the appellees, we do know that sufficient time elapsed thereafter for him to manifest his reaction, to exercise his pilot's judgment as to what type of evasive maneuver to undertake, and to execute his 90° bank to the extent that, from the time of initiating the maneuver to the time of impact, the jet's angle of descent increased from 5° to 17° with the result that at time of impact he was descending on a curve into the path of the DC-7 at the *downward* rate of not less than 167 feet per second.

This state of facts, which both the Government and the other appellees have painstakingly documented, permits of the drawing of a definite conclusion from the standpoint of applicable law.

1. *Under The Evidence Relied Upon By The Government And By The Plaintiff-Appellees Every Element Of The Doctrine Of The Last Clear Chance, Whereby United May Charge The Government With Liability Over, Has Been Shown To Be Present.*

The classic elements of the doctrine of the last clear chance, particularly as regards its applicability in favor of a negligently inattentive party (which the District Court found, and which the Government and the plaintiff-appellees assert, United to have been) have never been better stated than in *Girdner v. Union Oil Co.*, 216 Cal. 197, 13 P. 2d 915, from which, including the court's appropriate comments, we quote:

> "The real issue in cases of the character here involved is not whose negligence came first or

last, but whose negligence, however it came, was the proximate cause of the injury. (*Esrey v. Southern Pac. Co.,* 103 Cal. 541 [37 Pac. 500]; Beach on Contributory Negligence, sec. 50.)

"Whether or not, therefore, negligence is the proximate or remote cause is, as above stated a question of fact in each particular case. The doctrine of continuing negligence has no application unless the negligence is the proximate cause of the injury. On the other hand, if all the elements of the last clear chance doctrine are present and plaintiff's negligence becomes remote in causation, then this doctrine applies. If any one of the elements of the last clear chance doctrine is absent, then plaintiff's negligence remains the proximate cause and bars recovery. But the continuous negligence rule does not apply to a situation in which the last clear chance rule, by the presence of its own elements, is brought into operation. Where these necessary elements are lacking, courts have declared, and rightfully so, that plaintiff's negligence being continuous and contributory with that of defendant bars a recovery. The necessary elements, as deduced from the well-considered cases, may be stated in substance as follows: That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but *also in cases where he is totally unaware of his danger and for that reason unable to escape;* that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and has the last clear chance to avoid the accident by

exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure. It has been said that such failure by defendant to use ordinary care under such circumstances *amounts to a degree of reckless conduct that may well be termed wilful and wanton,* and when an act is thus committed, contributory negligence upon the part of the person injured is not an element which will defeat a recovery. (*Esrey v. Southern Pac. Co., supra,* at p. 545.)

"We do not deem it necessary to review and discuss the numerous cases cited by appellants. The apparent confusion which exists in some of the decisions upon the subject arises in the application of the law to the facts, but as to the rule itself there is little or no confusion. It would be a strange case indeed, to say the least, that would declare it to be permissible to run down and injure one simply because he was in a position of peril of which he was unaware, without responding in damages *for his wilful act.* Such, of course, is not the law. *A defendant is never relieved of liability if he has it in his power to prevent the injury.* This doctrine applies whether one is unaware of his peril by reason of his negligence, or when exercising ordinary care is so ignorant. In either situation the rule is the same. *A defendant is not privileged to injure another simply because he is negligently* or *otherwise in a position of danger.* If he has the opportunity of avoiding the injury, he must at his peril exercise it. The rule of the last clear chance means just what the words imply. *A party who has the last chance to avoid the accident, notwithstanding the previous negligence of a plaintiff, is solely responsible.*

(Townsend v. Butterfield, 168 Cal. 564 [143 Pac. 760]; *Harrington v. Los Angeles Ry. Co.,* 140 Cal. 514, 526 [98 Am. St. Rep. 85, 63 L.R.A. 238, 74 Pac. 15]; *Palmer v. Tschudy,* 191 Cal. 696 [218 Pac. 36]; *Berguin v. Pacific Elec. Ry. Co.,* 203 Cal. 116 [263 Pac. 220]; *Darling v. Pacific Electric Ry. Co.,* 197 Cal. 702 [242 Pac. 703]; *Atkins v. Bouchet,* 86 Cal. App. 294 [260 Pac. 828]; *O'Farrell v. Andrus,* 86 Cal. App. 474 [260 Pac. 957]; *Smith v. Los Angeles Ry.,* 105 Cal. App. 657 [288 Pac. 690].)" (216 Cal. at pp. 201-202.)

Translated to the instant case we find, based upon the assumptions and argument of the Government and the plaintiff-appellees:

1. *United had been negligent:* This is implicit in every contention made by the parties in question; and the District Court so found.

2. *As a result of such negligence, United's DC-7 was in a position of danger:* This, too, is implicit.

3. *The crew of the DC-7 was totally unaware of their danger:* This, too, is implicit in the contentions of United's adversaries, for they charge negligent inattention; but, as we have seen, *negligent inattention also means, in law, that United's crew was unable to escape by the exercise of ordinary care.*

4. *The crew of the Air Force jet, or at least one of them, the instructor-pilot, had knowledge that the DC-7 was in a position of danger:* This is proven by the fact postulated by appellees: that the jet was engaged in an evasive maneuver, which means that the jet saw the plight of the DC-7.

5. *The crew of the jet knew, or in the exercise of ordinary care should have known, that the DC-7 could not escape from its plight:* Sighting the DC-7, it must

have been apparent to the crew of the jet that the air liner was not engaged in an evasive tactic, but was holding to its course; and further, the jet crew must have known, as was the fact (10 Rep.Tr. 1324) that the jet was a far more maneuverable plan than was the DC-7.

6. *The jet had the last clear chance to avoid the collision by exercising ordinary care and failed to do so:* The cases hold that the defendant's chance — his opportunity — need only be later by the amount of time that a normal reaction might be expected to ensue under the circumstances: time to appreciate the situation and take effective action within the existing time and distance limitations. Cf. *Peterson v. Burkhalter,* 38 Cal. 2d 107, 112, 237 P.2d 977; *Milby v. Diggs,* 118 W. Va. 56, 189 S.E. 107, 108: "time for both appreciation of the situation and effective effort to relieve it." All appellees assert and the District Court found, that the crew of the DC-7 negligently failed to see the jet; therein lay its peril. But it is the case of the Government and of the plaintiff-appellees that the jet pilot did see the DC-7, did appreciate the situation and did take what in his judgment was an effective effort to avoid the collision. As it happened, however, his rolling into a 90° bank downward produced the collision rather than avoiding it, as a maneuver upward and away from the DC-7 would have done.

The short of it is this: If the pilot, again the instructor, being *above* the DC-7, had time to react by rolling into a bank or an accentuated *downward* course which curved him into a right-wing-to-right-wing collision with the DC-7, he also had time, in the exercise of due care, to execute an evasive maneuver *upward and away* from the path of the airliner, in which case there would have been no collision at all. In these circumstances it is clear, on the appellees' own theory

of the case, that the jet pilot had a *choice;* and that he took a chance and lost on a dangerous maneuver when he had the alternative of executing a safe one. This was and is either reckless conduct or, at the very least, active negligence within the framework of the last clear chance doctrine. Such being the case, United, as the victim of last clear chance negligence, is entitled to recover over as against the Government, the primary tort-feasor. Cf. *United States v. Savage Truck Line,* 4 Cir., 209 F.2d 442.

It remains to reconcile this situation, as near as may be, with the findings of the District Court. Thus it found that the jet crew negligently failed to see and to avoid the DC-7. (F. 73: Government's Opening Brief, Appendix A - p. 25) and that such negligence was a proximate cause of the collision (F. 82: Government's Opening Brief, Appendix A- p. 26). Findings 73 and 82 made the same determination as to United: proximately causative negligence on the part of the DC-7 crew in failing to see and avoid the jet. But the evidence relied upon by appellees leads directly to the conclusion that at a time when it was not upon a collision course, the jet in effect dove upon the DC-7 after its pilot perceived the DC-7 cruising along below it. In these circumstances, the other elements of last clear chance being present, any negligence on the part of the DC-7 crew ceased to be a proximate cause of the collision, with the result that Finding 82 is without substantial support so far as United is concerned. (Cf. *Girdner v. Union Oil Co., supra,* 216 Cal. 197, 13 F.2d 915.)

This last minute dive of the jet upon the DC-7 which the appellees implicitly postulate, has still another consequence, wholly aside from the applicability of the doctrine of the last clear chance.

B. The Evidence Postulated by Appellees as to the Pre-Collision Change of Course by the Jet Clearly Indicates That Irrespective of the Applicability of the Last Clear Chance Doctrine, United Was in Any Event Guilty of No More Than Passive Negligence in Holding to Its Course and Hence Is in Any Event Entitled to Indemnity From the Government.

As we have seen, it follows from the thesis of appellees that the two planes were not on a collision course prior to the initiation of the jet's downward maneuver. In these circumstances the jet was obviously the actor, which is to say the aggressor; the role of the DC-7 thus was, at most, purely passive, by any standard. Cf. *Basler v. Sacramento Gas & Electric Co.,* 158 Cal. 514, 518; and see cases cited at pp. 39 *et seq* of United's Opening Brief. It was the jet pilot's decision to change course downward and *toward* the DC-7 which precipitated the collision; not any act of the DC-7 crew. The actual hazard of collision did not develop until *after* the jet pilot had made his fateful decision not to maneuver up and away from the air liner but rather to embark on the downward path to disaster. In the meantime, the DC-7 was holding to its course and maintaining its right of way. If this be deemed to have been negligence at all, as the District Court found, it was nothing more than the negligence of doing nothing in the face of a collision hazard unilaterally created by the fatal downward plunge of the jet. Once again, this do-nothing negligence was purely passive as against the active negligence of the jet pilot in taking a chance on a dangerous maneuver when a safe course—up and away—was open to him.

In these circumstances, it is respectfully urged that, again as between United and the Government, the finding (84: Government's Opening Brief, Appendix A - p. 26) of active, as distinguished from passive, negli-

gence on the part of United is clearly erroneous under the hypothesis advanced by the appellees as being without substantial support from the evidence and as being against the clear weight of the evidence. And this, in turn, means that the appellees have demonstrated, if their thesis be correct, that the District Court erred in holding and deciding (Conclusion of Law XVI) that United is not entitled to indemnity from the Government. From appellees' own theory, it is demonstrable that the DC-7 was the victim of last clear chance negligence on the part of the Government; and that, in any event, any negligence on the part of United was purely passive. In either event, United's right to indemnity against the Government is clear.

IV.

The Pre-Collision Acts and Omissions Charged to United, if They Be Regarded as Being Negligent at All, Were Remote From the Standpoint of Causation and in Any Event Did Not Constitute Breaches of Any Duty Owed the Government.

With the infallibility which is the undoubted privilege of hindsight, the plaintiff-appellees present a superficially imposing list of asserted pre-collision derelictions on the part of United. Our views with regard to them have been set forth in United's opening brief, both as concerns the plaintiffs and the Government (United's Opening Brief, pp. 56-59, 66-69) and there is no need for repeating them here. Most of them are strictly of the "but for" variety; akin to a claim, for instance, that "but for" the departure of Flight 736 from Los Angeles the collision would not have happened. The crux of the present litigation centers about what happened at and immediately prior to the tragedy of the collision. In the circumstances of these cases

it is respectfully suggested that the question of proximate cause is to be determined from the actions and reactions of the respective crews at and on the scene. And as to this, one thing we know for certain: Flight 736 had a right to be where it was, both by virtue of a clearance from the CAA and by virtue of the fact that that it had the right-of-way over the jet which dove upon it on an approach from the left and from above. It is in this area—the happenings at the scene—that the question of fault is to be determined, so far as the passenger-plaintiffs are concerned.

As far as concerns the Government, none of the pre-collision matters dwelt upon by the other appellees affect its liability over to United. The CAA negligently cleared Flight 736 into the Nellis Area without warning it of the fact, which it knew, that the Air Force was practicing instrument approaches in and upon Victor 8 airway without either IFR clearance or Victor 8 traffic information. This was active negligence. *Indian Towing Co. v. United States,* 350 U.S. 61, 64, 65; *United States (Eastern Air Lines) v. Union Trust Co.,* D.C. Cir., 221 F.2d 62, judgment against Government affirmed on authority of *Indian Towing,* 350 U.S. 907; and in this connection the attention of the Court is respectfully invited to United's brief, as appellee on Government's appeals herein, pages 21-23. Added to this, the operation of the jet within Victor 8 airway in the manner in which, and under the circumstances in which, it was operated constituted reckless or willful misconduct for the reasons set forth in United's opening brief and as well in its brief as appellee on the Government's appeals.*

*For discussion of the Government's culpability for reckless or wilful misconduct generally, see United's Opening Brief, pp. 24-28; as to the particulars in which the Nellis Command and the crew of the jet disregarded orders from above as well

In these circumstances, the attempt of the Government to make capital, at United's expense, of any pre-collision acts or omissions on the part of the latter is wholly without justification, as pointed out particularly at pages 56-59 of United's Opening Brief.

V.

The District Court Erred With Reference to the Instruction to the Jury on the Applicability of the Doctrine of Res Ipsa Loquitur.

It will be recalled that United assigned error in the failure of the District Court to instruct the jury that exclusive control of the instrumentality causing the injury was an essential ingredient to the applicability of the doctrine of *res ipsa loquitur* and that since this ingredient was clearly lacking in this collision case, United also assigned error to the giving of any *res ipsa loquitur* instruction at all. Underlying United's argument in these particulars was the proposition that the District Court should, in the regards under discussion, have charged the jury under Nevada law.

This appellant is upbraided by the plaintiff-appellees for having, it is said, ignored the proposition that under the California law with reference to conflict of laws, a California court would decide the question of the applicability of *res ipsa* under its own laws rather than under the laws of Nevada. The corollary to this is, according to the plaintiffs, that California would do no more than determine, under its own laws, whether the question of the applicability of the doctrine lay in the substantive or in the procedural field; and if in the latter, there would be an end of the matter.

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as applicable AFR (Air Force Regulations) and CAR (Civil Air Regulations) the attention of the Court is respectfully invited to United's brief as appellee on the Government appeals, pp. 16-21.

The problem may not, however, be solved by any oversimplification such as this in these cases. These are actions, the substantive rights underlying which, whatever they may be, spring from foreign statutes: The wrongful death statutes of the State of Nevada. Under the California law of conflicts, the sufficiency of the several complaints to state a cause of action under this foreign statute would, unlike a complaint charging a common law tort, be governed by the law of *Nevada*. *Emery v. Emery,* 45 Cal.2d 421, 425. It is hornbook law in California that, in order to warrant recovery, the *allegata* and the *probata* must correspond. *C.f. Estate of Boyes,* 151 Cal. 143, 147. Thus, in the first instance a plaintiff would of necessity be required to *plead* himself within the Nevada statute to the satisfaction of a California court applying Nevada law. *Emery v. Emery, supra,* 45 Cal.2d 421. From this it would seem necessarily to follow that the question as to whether the same plaintiff had *proven* himself within the Nevada statute would also be determined by the California court with reference to Nevada law.

California has not decided this question, precisely as in *Grant v. McAuliffe, supra,* 41 Cal.2d 859, it was pointed out that it had previously not decided the question of whether the survival of causes of action should be treated as procedural rather than as substantive. And it is important to note that, in the respects under discussion, the California Supreme Court also declared in *Grant v. McAuliffe* that the question of substantive versus procedural will be determined "according to the nature of the problem for which a characterization must be made." 41 Cal.2d at 865.

Here the problem before a California court would be whether or not, substantive rights being admittedly involved as regards the question of the sufficiency of

a complaint to state a cause of action under a foreign statute, the same rights are not also necessarily involved as regards the question of the sufficiency of the evidence to sustain the allegations invoking the provisions of the foreign statute, thus making both questions referable to the foreign law under a logical extension of the holding in *Emery*.

As to this, it is respectfully submitted that there is no distinction in principle or in logic between these two situations and that California would look to Nevada law in order to ascertain whether the cause of action under the Nevada statute had been both properly pleaded and properly made out under the proofs. And in this connection the cases following *Erie R. R. Co. v. Tompkins,* 304 U.S. 64, in the conflict of laws area are fully persuasive, including particularly *Lachman v. Penna. Greyhound Lines,* 4 Cir., 160 F.2d 496 and *Smith v. Penna. Central Airlines Corp.,* D.C.D.C., 76 F.Supp. 940,* each quoted in United's Opening Brief. (Pp. 75-77.) It is therefore respectfully urged that the California court should and would hold, and that this Court may so declare, that the sufficiency of the evidence to sustain these Nevada statutory causes of action are matters of substantive law and hence, in this setting, referable to Nevada law under the California conflicts principle that the *lex loci* governs foreign causes of action in general and the sufficiency of a complaint to allege a cause of action under a foreign statute in particular.

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*Despite the aspersions attempted to be cast upon them by plaintiff-appellees, each of these cases held that where, as here, the law of the forum provides the *lex loci* governs in tort actions, the applicability of *res ipsa* is properly referred to the law of the state conferring the cause of action. And implicit in their respective determinations is the proposition *that the forum would so hold.*

It remains to refute the plaintiff-appellees' contention that there is no distinction between the law of Nevada and the law of California as regards the element of exclusivity of control of the instrumentality causing the injury. It will be recalled that in United's Opening Brief (p. 70) it was pointed out that while California had abandoned the requirement of exclusive control as an ingredient of *res ipsa,* Nevada has not, citing *Nybert v. Kirby,* 65 Nev. 42, 188 P.2d 1006.

Despite the appellees' attempt to play down the *Nyberg* case by showing that the injurious instrumentality in that case *was* under the sole control of the defendant, the fact is that in that case the Nevada Supreme Court did *hold* that the factual situation in that case came squarely within the *res ipsa* doctrine, including the element of exclusivity of control. 188 P.2d at 1021. And in *Las Vegas Hospital Assn. v. Gaffney,* 64 Nev. 225, 180 P.2d 594, cited by appellees, the Nevada court again stressed the fact that "proof that the thing which caused the injury to the plaintiff was under the control and management of the defendant" was an essential ingredient of the doctrine. 180 P.2d 598. And it also pointed out, 180 P.2d at 599, that the doctrine is based in part upon the theory *that the defendant is in charge of the instrumentality.* So, also, in *Garibaldi Bros. Trucking Co. v. Waldren,* 74 Nev. 42, 321 P.2d 248, the doctrine was applied in the light of the fact that the vehicle was in the exclusive control of the defendant, as was the railroad train in the exclusive control of the *defendant in Sherman v. So. Pac. Co.,* 33 Nev. 385, 111 Pac. 416.

It is therefore respectfully urged that Nevada does, as California does not, require exclusivity of control of the instrumentality causing the injury as a necessary ingredient of the doctrine.

From what has been said, several conclusions follow. First, and admittedly, California would apply Nevada law to test whether the complaints in the instant cases stated a cause of action under the Nevada wrongful death statutes. Second, under the principle that the *allegata* and the *probata* should correspond, a California court should apply Nevada law in order to determine whether the plaintiffs had proven their case under the Nevada statutes. Third, under Nevada law the District Court erred in refusing to instruct the jury that exclusivity of control of the instrumentality causing the injury must be found before that body could draw any inference of negligence against United under the doctrine; and lastly, since exclusivity of control was undeniably absent, the court erred in instructing under the doctrine at all.

VI.

The District Court Erred, in the Seven Nevada Cases, in Granting Motions for Summary Judgment as to Liability Issues.

Acting upon the assumption that federal, and not California, law governed as to the question of finality of the *Wiener* judgments for purposes of collateral estoppel, the District Court granted motions for summary judgment against United and in favor of the respective plaintiffs as to the issue of liability in the seven Nevada cases. That court's opinion in this regard is reported at 216 F.Supp. 717 et seq.

In so doing, the District Court erred. The cases as between the respective plaintiffs and United were diversity cases, and the substantive law of California, the jurisdiction in which they were rendered, governed as to the question of their finality and their availability, pending appeals therefrom, as a basis for collateral estoppel. *Erie R R Co. v. Tompkins, supra,* 304 U.S. 64;

cf. *Stoll v. Gottlieb,* 305 U.S. 165, 170; *Caterpillar Tractor Co. v. International Harvester Co.,* 3 Cir., 120 F.2d 82, 85.

It is also well settled in California, whatever the law in other jurisdictions may be, that pending an appeal, a trial court judgment is not final for purposes of *res judicata* or collateral estoppel and is hence not even *competent* to prove such an estoppel. Cal. Code Civ. Proc. §§ 1049, 1908, 1962(6); *Brown v. Campbell,* 100 Cal. 635, 646, 35 Pac. 433; *Harris v. Barnhart,* 97 Cal. 546, 550, 32 Pac. 589; and see other California cases cited at pp. 82-83 of United's Opening Brief.

The plaintiff-appellees make a number of contentions directed toward sustaining the summary judgments. However, in view of their concession at page 73 of their brief that "If the *Wiener* judgment [sic] against United were to be reversed, obviously the Nevada judgments would be also," it is not necessary to answer them in detail. In broad outline, the answers to such contentions may be stated as follows: 1. The judgment on the cross-claims between United and the Government may not be looked to, for under familiar principles of *res judicata* the issues were not the same. As between the plaintiffs and United, the question was one of asserted breach of the duty of utmost cared owed the passengers, whereas as between United and the Government the question was one of asserted breach of ordinary care which each owed the other; different duties, hence different causes of action and, more particularly, different issues. 2. Nevada law is not pertinent; the *Wiener* judgments were rendered in California. 3. Federal law is not pertinent; the Wiener judgments were judgments rendered in diversity cases. 4. *Res ipsa loquitur* is not here applicable for reasons already given; and in any event any inference of negli-

gence thereunder is to be drawn by the triers of fact, not to be assumed as a matter of law. Cf. *Sweeney v. Erving,* 228 U.S. 233, 240.

For the reasons given it is respectfully urged that the District Court erred in granting the motions for summary judgment.

VII.

The Increasing, in Two of the Nevada Cases, of the Amounts of the General Verdicts Constituted a Misuse of the Special Interrogatory Process and an Improper Additur.

Section 41.090 of the Revised Statutes of Nevada, as in effect on April 21, 1958, and relating to death cases, provided in pertinent part as follows:

> "The court or jury, as the case may be, in every such action may give such damages, pecuniary and exemplary, as shall be deemed fair and just. Every person entitled to maintain such action, and every person for whose benefit such action is brought, may prove his respective damages, and the court or jury may award such person that amount of damages to which it considers such person entitled."

Nevada thus speaks of such pecuniary damages as may be fair and just. And plaintiff-appellees concede that Nevada holds that, save as regards exemplary damages, recoverable in Nevada but not in California, there is no "material point of difference" between the laws of Nevada and of California as regards the right to recover the pecuniary loss suffered by heirs or next of kin by reason of the death of the decedent, Cf. *Christensen v. Floriston Pulp & Paper Co., 29* Nev. 552, 92 Pac. 210, 216-217; and see Calif. Code Civ. Proc. § 377. Principles laid down in California cases may therefore appropriately be referred to as bespeaking the

equivalent of Nevada law in the field under discussion.

At this point it will be helpful to compare just what the District Court did here, in increasing the amount of the general verdict in the *Nollenberger* and *Matlock* cases, with what should have been done, in the eyes of applicable law. The detail of the District Court's labors in the regard under discussion are presented in that certain letter to counsel herein dated October 2, 1963, the contents of which are self-explanatory and which is set forth in the Appendix hereto.* The procedure followed in each of the two cases was identical.

Following the answers of the jury to the special interrogatories, the court took the following as conclusive and incontrovertible facts upon which to base its purely mathematical calculations:

That plaintiff's decedent had a prospective life span extending—no more and no less—to a day and date 25 years from and after April 21, 1958;

That his work and earning capacity would extend—again no more and no less—to a day and date 15 years from and after April 21, 1958, during which period he would earn exactly $235,210:

That during the remaining 10 years of his prospective life span he would receive pension benefits in the sum of exactly $100,200;

That he would, during his prospective life span have provided services, capable of being furnished by others, in the reasonable value of $25,000; that 25% of his annual earnings would have been used for his own personal expenses; that 15% of his income would have

*The record references are set forth in Part V of the Appendix to United's Opening Brief, as pointed out in said letter to counsel; and the detail of the calculations of the District Court also appear at 216 F.Supp. 743-749, *sub. nom. Nollenberger v. United Air Lines, Inc.*

been paid as income tax; that 11% of the income from the award will be paid by plaintiffs as income tax; that an annual rate of inflation of 1% should be allowed in determining the present reasonable value of such services as the decedent might have provided; that a discount rate of 4% should be allowed in arriving at the total sum of general damages in *praesenti.*

The court, again, as we say, taking each of the foregoing items as matters of incontrovertible fact constituting an iron-clad measure of damages in this wrongful death case, made detailed calculations based thereon, with the following results:

Case	Jury Verdict	Court Judgment	Increase*
Nollenberger	$114,655	$171,702	$57,047
Matlock	157,969	207,420	49,451

It will thus be seen that the District Court regarded each of the factors of anticipated life expectancy, future earnings and pension accruals and future furnished services, to name the principal items, as being fixed, immutable and unchangeable factors productive of a mathematically certain result. In a word, it treated the situation as if each of the factors found by the jury were elements of a fixed measure of damages and as such being "issues of fact the decision of which is necessary to a verdict" within the intendment of Rule

*Included in the increase was pre-judgment compounded interest for a 5-year period from date of death to date of trial and judgment, declared by the District Court to be May 1, 1963. While these amounts of compounded pre-judgment interest do not bulk large in this litigation, the fact remains that they were improper, Nevada having no statute providing for pre-judgment interest in unliquidated tort damage cases. Cf. Nev. R.S. §19.130; 7% from entry of judgment, when no rate provided by contract or otherwise by law or specified in the judgment; § 18.120: interest on verdict or judgment from time rendered or made, to be included in the judgment as entered; § 37.175: refers to eminent domain proceedings; and see *Pearson v. Northeast Airlines, Inc.,* 2 Cir., 307 F.2d 131, 133, 136; *Zinn v. Ex-Cell-O Corp.,* 148 Cal.App.2d 56, 82.

49(b) of the Rules of Procedure. In doing this, however, it erred. *Temple v. De Mirjian,* 51 Cal. App. 2d 559, 566, 125 P.2d 544; *Harrison v. Sutter St. Ry. Co.,* 116 Cal. 156, 47 P. 1019.

Neither the court nor the jury was here dealing with a fixed measure of damages, as for instance the factors of contract price and market price as being fixed elements of the measure of damages for breach of a contract of sale or purchase; or, again for instance, the element of value of the property in a conversion case. The matters here under discussion were admissible, certainly, as constituting data which the jury might and should properly take into consideration in arriving, in their sound discretion, at the ultimate fact of damage.* But the fact of their admissibility, as a *guide* for the jury, did not confer upon such matters the additional attribute of iron-bound certainty and conclusiveness.

In *Harrison v. Sutter Street Railway Co., supra,* 116 Cal. 156, 47 P. 1019, a wrongful death case, the jury in effect did what the District Court did here: it accorded virtual certainty to the life expectancy and to the present earning power of the deceased. The verdict was set aside as excessive and a motion by the defendant for a new trial was granted. Upholding the trial court's action, the California Supreme Court said:

> ". . . The jury would seem to have proceeded upon the theory that the deceased's expectancy of

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*Plaintiff-appellees industriously seek to misunderstand United's position when they say (Bf., p. 95) that United argues that "the jury can render any verdict it pleases." It is the plain duty of that body, in an unliquidated tort damage situation such as the present, to follow the Court's instructions, take into consideration all evidentiary matters relevant to the issue of damages and then exercise their proper discretion in arriving at their award. The point is of course that in such a situation the jury cannot, nor can the trial court in their stead, be straightjacketed by a mathematical formula into an abandonment of such discretion.

life would be fully realized, and that he would continue to the end with the same earning capacity as that possessed by him at the time of his death, for their verdict implies that he would have earned, over and above the amount required for his personal needs, the large net sum of eight thousand dollars, and this would necessarily contemplate constant employment without interruption from sickness or other cause, and with a rate of earnings in no way diminished, since it will readily be perceived that according to his income his utmost gross earnings in the given time would not have exceeded twelve thousand dollars.

"Such a result does not accord with ordinary human experience. *The deceased's expectancy of life was not a certainty, but a mere probability.* It is true he might have lived even longer than the limit of such expectancy, but the chances were much against it. He might also have retained his vigor and ability to labor to the last, but ordinary experience teaches that the weight of advancing years, after the age attained by deceased, bears strongly against such result. . . ." (116 Cal. at 164.)

The court in the *Harrison* case also had the following to say, as regards the proposition that mortality tables show nothing more than probabilities, based upon averaged experience:

"The court charged the jury that the plaintiff was entitled to 'recover the reasonable amount which Mr. Harrison would probably have earned in the nine or ten years *which it appears he had yet to live,* according to these tables in evidence, and which are also a guide. You may take them into consideration, as they are part of the proof that he might have lived that long.'

"It is objected by defendants that this was virtually telling the jury that the Carlisle tables es-

> tablished the fact that deceased would have lived nine or ten years. We hardly think the instruction would be so understood, but yet the language is not as clear as it should have been. The jury should have been instructed that, in determining the probable length of life the deceased would have enjoyed, they were entitled to consider these mortality or expectancy tables as evidence bearing on that question, and as tending to show the ordinary experience in like cases." (116 Cal. at 168.)

As regards the proposition that the present worth of future pecuniary loss is not to be regarded as conclusive, another California court had this to say in *Emery v. So. Calif. Gas Co.,* 72 Cal.App.2d 821, 165 P.2d 695:

> "*The proposed evidence as to the present worth of future pecuniary loss was not conclusive evidence as to the amount of damages to be awarded.* In determining the amount of damages, such evidence was to be considered with several other elements, such as the health, activity and occupation of the deceased, his earning capacity, and the various amounts which reasonably might be expected to be contributed by him for support over the period the jury finds he would furnish such support. An instruction should be given, stating the restrictive significance of such evidence, to the effect that *such evidence as to the present value of future pecuniary loss is not conclusive as to the amount to be awarded as damages, but is only one of several elements to be considered in determining the amount to be awarded.*" (72 Cal.App.2d 826.)

So, also, it is well settled that in personal injury cases, the question of just and reasonable compensation is one not possible of exact ascertainment and the only standard is such an amount as a reasonable person would *estimate* as fair compensation since the

various factors involved are not capable of exact proof in terms of dollars and cents. *Cooksey v. Atchison, T. & S.F. Ry. Co.,* 78 Cal.App.2d 504, 508, 178 P.2d 69; *Roedder v. Lindsley,* 28 Cal.2d 820, 822, 172 P.2d 353. Likewise, in wrongful death cases, the earning power of the decedent, while it may properly be considered, is not determinative as to amount. *Evarts v. Santa Barbara R. Co.,* 3 Cal.App. 712, 715, 86 P. 830; and see, as to personal injury actions generally, *Storrs v. Los Angeles Traction Co.,* 134 Cal. 91, 94, 66 P. 72.

Here the jury did precisely what, under the law, they should have done. They took into consideration the various factors embodied in the special interrogatories. This is evident from the fact that they answered them. Upon such considerations they then arrived at their verdict as to the general damages, as evidenced by their respective answers to Interrogatory 12 in each case. The answers to the interrogatories having been received, the District Court then did what the law does *not* permit, i.e., it treated the various evidentiary matters elicited by the first 11 interrogatories as being *conclusive* and it utilized them as the basis for a purely mathematical computation which substantially increased the amount of the jury's award in each case. This was error* which is not justified by any of the cases upon which the appellees rely as sanctioning the District Court's action.

We say this for the reason that none of those cases dealt with a situation even remotely resembling that present here. All of them (see Appellees' Brief, p. 93) dealt with situations where there was present a provable fact or facts constituting a specific ingredient of a definite and certain measure of damages, as distinguished

*As one example, the court took as *conclusive* the life expectancy of the decedent alone in each case, whereas the proper criteria to have been considered by the jury were the joint (and of course lesser) expectancies of the decedent and the plaintiffs. Cf. *Temple v. De Mirjian,* supra, 51 Cal.App.2d 559, 565-566.

from the situation present in personal injury and wrongful death cases, where the ascertainment of the ultimate damage award is left to the sound discretion of the jury in the light of relevant but not conclusive evidentiary facts.

Thus *Frohman v. Rowe,* 83 Ind. 94, was an action upon a note and mortgage, where the measure of recovery was the amount due and unpaid upon the note, less any proper offsets; all ascertainable, provable and existent facts. *Wood v. Wack,* 31 Ind. App. 252, 67 N.E. 562, was an action in contract, where the measure was the difference between the contract price and the cost to the plaintiff of installing an electric light plant. In the same category is *Kirkpatrick v. McMilan,* 49 N.M. 100, 157 P.2d 772, where the measure was the difference between the contract price of a contract to grub, clear and level certain land and the cost to the plaintiff of doing so following breach. *Phelps & Bigelow Windmill Co. v. Buchanan,* 46 Kan. 314, 26 P.708, was an action to recover the value of a mill constructed on the defendant's land wherein there was no issue as to the value of the mill and the special interrogatories only went to the issue of performance by the plaintiff and the general verdict was for less than the conceded value of the mill. *Loewnburg v. Rosenthal,* 18 Ore. 178, 22 P. 601 is the only tort action cited by appellees to the instant problem, but it was an action for conversion where the measure was, and the special interrogatory was addressed to, the value of the wood taken. The award of the jury was corrected by the court due to the fact that the defendant was allowed an offset as a matter of law. In *Wayne v. New York Life Insurance Co.,* 8 Cir., 132 F.2d 28, an action upon an insurance policy, the special finding of the jury related to the date of total disability which, per the face of the policy, fixed the insurance liability for benefits ($2200) and return premiums ($626.92). The court corrected the jury's award of $2,000 only and its failure to include the return premium amount, observ-

ing that "The errors involved merely matters of calculations and no questions of fact." (132 F.2d at 37.) Here, of course, the action of the District Court did involve questions of fact. It treated as conclusive matters of fact, such as the life span of the decedent, future earning capacity and the like, which the jury had properly taken into consideration, but, with equal propriety, had not regarded themselves as bound thereby.

Our research has revealed no case where a trial court has increased a general verdict in a wrongful death case (or in a personal injury case either, for that matter) on the assumption that the jury should have given conclusive effect to the various criteria which it was entitled to consider in arriving at a just and fair verdict. And, having full regard and respect for the high abilities and thoroughness of our opponents, we are constrained to conclude that they have found none either, from which it may be further concluded that the two cases under discussion are unique in this respect. This fact, standing alone, may not be sufficient to condemn the action complained of; but certainly it affords no solace as to its correctness, particularly in view of the authorities which have been cited above.

The thesis of the District Court was, of course, that the general verdict was inconsistent with the answers to the special interrogatories within the purview of Rule 49(b). *Nollenberger v. United Air Lines, Inc.*, D.C. So. Cal., *supra*, 216 F.Supp. 734, 742. Underlying this thesis was the premise that the jury was bound to treat their answers to the eleven precedent special interrogatories as conclusive. This premise was, as we have shown, incorrect; the jury's duty did not extend beyond giving consideration to those answers, which it did. In these circumstances the action of the District Court in increasing the amounts of the general ver-

dicts, upon the same faulty premise, was prejudicial error in derogation of the Seventh Amendment to the Constitution of the United States.*

Conclusion.

For the reasons given herein and in United's Opening Brief, it is respectfully urged that each of the judgments appealed from (1) in favor of the respective passenger-plaintiffs and against United, and (2) denying indemnity to United from the Government and awarding contribution to the Government from United in any amount, should be vacated or reversed; and that (3) in the event, for any reason, the judgments in the *Nollenberger* and *Matlock* cases in favor of the passenger-plaintiffs in those cases and against United are not reversed, that such judgments be modified by reducing the judgments in said cases to an amount not in excess of $114,655 in *Nollenberger* and to an amount not in excess of $157,969 in Matlock.

Respectfully submitted,

CHASE, ROTCHFORD, DOWNEN & DRUKKER,
HUGH B. ROTCHFORD,
JAMES J. MCCARTHY,

O'MELVENY & MYERS,
PIERCE WORKS,
WILLIAM W. VAUGHN,
By PIERCE WORKS,
Attorneys for Defendant, Cross-Defendant and Appellant, United Air Lines, Inc.

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*"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Certificate of Counsel.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Pierce Works,
Attorney

APPENDIX.

Letterhead of
O'MELVENY & MYERS
433 South Spring Street
Los Angeles 13
620-1120

October
2nd
1963 882,613-7

To All Counsel in United Air Lines, Inc. vs. Janice Wiener, et al and Related Cases, Nos. 18510 to 18533, 18866 to 18872 on the Files of the United States Court of Appeals for the Ninth Circuit.

Gentlemen:

The purpose of this letter is to clarify certain references made on page 86 of the Opening Brief of Appellant United Air Lines, Inc. on file in said causes to Part V of the Appendix thereto.

In the second full paragraph on said page 86 of the Brief, reference is made to the Interrogatories propounded to the jury in the Nollenberger and Matlock cases. These interrogatories and the jury's answers thereto are referred to in Part V of the Appendix as "special verdicts on damages." In order that there be no confusion as to what is intended by these references, we set forth in full at this point the special interrogatories and the jury's answers thereto in both Nollenberger and Matlock:

NOLLENBERGER

"We, the Jury in the above entitled case, unanimously find as follows:

QUESTIONS	ANSWERS
1. Which one of the following named persons, viz: William Edward Nollenberger, 45 years of age on	

QUESTIONS	ANSWERS
April 21, 1958; Catherine B. Nollenberger, his widow, age 47 on April 21, 1958; William Edward Nollenberger, Jr., son, age 20 on April 21, 1958; Lawrence P. Nollenberger, son, age 11 on April 21, 1958; had the shortest life expectancy?	Wm. E. Nollenberger (Name)
2. How many years was that life expectancy on April 21, 1958?	25 (Total number of years)
3. How many years was decedent's work and earning expectancy from and after April 21, 1958?	15 yrs. (Total number of years)
4. From and after April 21, 1958, what total sum of money do you find the decedent would have earned during the period of his work and earning expectancy stated in your answer to No. 3 above?	$235,210 (Total)
5. From and after the end of his work and earning expectancy, and during the remainder of his life, if any such remained, what total sum of money do you find decedent would have received as a result of his government employment?	$100,200 (Total sum)
6. What is the total reasonable value of services susceptible of being furnished by others which you find it was reasonably probable	

QUESTIONS	ANSWERS
that decedent would have provided under my instructions to you to the plaintiffs during his lifetime?	$25,000 (Total value)
7. What percentage of his annual earnings, had he lived, from and after April 21, 1958, would have been used by decedent for his own personal expenses which were eliminated by his death?	25% (Percentage of annual earnings)
8. What percentage of his income would be paid as annual income tax had he lived after April 21, 1958?	15%
9. What percentage of the income from the award will be paid by plaintiffs as income tax?	11%
10. In determining the present reasonable value of services as defined in No. 6 above, what annual rate of inflation, if any, do you find should be allowed?	1%
11. What discount rate should be applied in arriving at the total sum of general damages?	4% (Discount rate)
12. What sum of money do you find plaintiffs' general damages to be which you assess against Defendant United Air Lines?	$114,655.00

DATED: At Los Angeles, California, January 16, 1963.

S/ Burford A. Reynold

Foreman"

R. (Nollenberger) 402.

MATLOCK

"We, the Jury in the above-entitled case, unanimously find as follows:

QUESTIONS	ANSWERS
1. Which one of the following named persons, viz: Charles Dale Matlock, 40 years of age on April 21, 1958; Marjorie I. Matlock, his widow, 38 years of age on April 21, 1958; Mardale Matlock, daughter, 16 years of age on April 21, 1958, had the shortest life expectancy?	Chas. Dale Matlock (Name)
2. How many years was that life expectancy on April 21, 1958?	30 (Number of years)
3. How many years was decedent's work and earning expectancy from and after April 21, 1958?	20 (Number of years)
4. From and after April 21, 1958, what total sum of money do you find the decedent would have earned during the period of his work and earning expectancy stated in your answer to No. 3 above?	319,014 (Total)
5. From and after the end of his work and earning expectancy, and during the remainder of his life, if any such remained, what total sum of money do you find decedent would have received as a pension paid as a result of his government employment?	111,120.00 (Total sum)

QUESTIONS	ANSWERS
6. What is the total reasonable value of services susceptible of being furnished by others which you find it was reasonably probable that decedent would have provided under my instructions to you to the plaintiffs during his lifetime?	45,000.00 (Total value)
7. What percentage of his annual earnings, had he lived, from and after April 21, 1958, would have been used by decedent for his own personal expenses which were eliminated by his death?	25% (% of annual earnings)
8. What percentage of his income would be paid as annual income tax had he lived after April 21, 1958?	16.6
9. What percentage of the income from the award will be paid by plaintiffs as income tax?	13%
10. In determining the present reasonable value of services as defined in No. 6 above, what annual rate of inflation, if any, do you find should be allowed?	1%
11. What discount rate should be applied in arriving at the total sum of general damages?	4% (Discount rate)
12. What sum of money do you find plaintiffs' general damages to be which you assess against Defendant United Air Lines?	$157,969.00

DATED: At Los Angeles, California, January 25, 1963.

Burford A. Reynolds
Foreman"
R. (Matlock) 432.

In the third full paragraph on said page 86 of said Brief, reference is made to the District Court's computations of damages in the Nollenberger and Matlock cases. These computations are not specifically identified in Part V of the Appendix. However, they do appear in the District Court's Memorandum on Motions for New Trial which is cited in the Appendix. See R. (Nollenberger) 494 and R. (Matlock) 541. The following is the text of that portion of the District Court's Memorandum which contains those computations:

NOLLENBERGER

ITEM I

Earnings after death to date, i.e., 4/21/58 to 5/1/63 ..... $ 60,558.00[6]

Minus 25% [Ans. 7]*, 15% [Ans. 8] and 6½% contribution to decendent's pension, i.e., 46½%, which leaves 53½% of $60,588 total contribution to family for above period ..... $ 32,399.00[7]

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[6]Exs. 5 and 12: Salary Acts of 1958, 1960 and 1962; 72 Stats. 203; 74 Stats. 296; 76 Stats. 832; 5 U.S.C. 1113 et seq. Inasmuch as salary and step increases were fixed by said statutes, it becomes a mere calculation as a matter of law, and in arriving at said sum the court is not substituting its judgment for that of the jury.

[7]Where cents are less or more than 50, the figures throughout are rounded out to the nearest dollar.

*Reference is here made to the jury's answer to Special Interrogatory 7. Similar references throughout the Court's computations are to the answer of the jury to other Special Interrogatories.

$32,399 ÷ 5 years equals $6,480 annually; Interest on each annual total of $6,480, compounded annually at 4% [Ans. 11] from one year after death to 5/1/63....$ 2,696.00

TOTAL OF ITEM I.....$ 35,095.00

ITEM II

Answer 4—Total earnings during work expectancy of 15 years [Ans. 3].....$235,210.00

Minus earnings in five years since death to date [Item I].....$ 60,558.00

Earnings during 10 years remainder of work expectancy $174,652.00

Minus 25% [Ans. 7], 15% [Ans. 8] and 6½% contribution to his pension, i.e. 46½%, leaves 53½% of $174,652.00 as contribution to family for balance of work expectancy (120 months) from 5/1/63, viz: .....$ 93,439.00

To be discounted to present worth as follows: $93,439 ÷ 120 equals monthly contribution to family during balance of work expectancy of.....$ 779.00

Discount factor from Ex. 9 [10 yr.—99.10] x $779.00 monthly equals—$77,199.00—

Total of Item II, present worth of $93,439 discounted to present value [779 x 99.10][8] .....$ 77,199.00

That is to say, $77,199.00 invested today (May 1, 1963) at four per cent interest will produce $93,439.00 at the rate of $779.00 per month for the next 120 months, at the end of which time both the principle and interest will be exhausted.

[8]Ex. 9 which is used in all the discount calculations herein.

ITEM III

Answer 5—Total pension	$100,200.00
Minus 25% [Ans. 7] and 15% [Ans. 8], i.e., 40% as contribution to family, leaving 60% of $100,200 to be discounted to present worth as follows:	$ 60,120.00
$60,120.00 divided by 120 months [10 yr. life expectancy after work expectancy, Answers 2 and 3] equals monthly contribution to family	$ 501.00
Discount factor [Ex. 9] at 4% [Ans. 11] is 66.95. [Pension not being due until 10 years from now (5/1/63) and payable for 10 years, discount factor is secured by subtracting 10 yr. factor of 99.10 from 20 year factor of 166.05, which equals 66.95].	
TOTAL ITEM III—501 x 66.95 equals	$ 33,542.00

That is to say, $33,542.00 invested today (5/1/63) at four per cent will produce $60,120.00 at the rate of $501.00 per month for ten years beginning 10 years from now, at the end of which time both the principle and interest will be exhausted.

ITEM IV

Total value [Ans. 6] of personal services of decedent to plaintiffs over decedent's life expectancy of 25 years [Ans. 2]	$ 25,000.00
A—From death to 5/1/63 at $1,000 per year	$ 5,000.00
Total interest at 4% [Ans. 11] compounded annually on each annual sum of $1,000 from one year after death to 5/1/63, plus 1% inflation [Ans. 10] equals	$ 525.00
TOTAL ITEM IV-A	$ 5,525.00

B—Total from 5/1/63 to end of life expectancy which is 20 years [Ans. 2].....$ 20,000.00

Add inflation of 1% per year [Ans. 10] on $1,000 annually for 20 years.....$ 2,021.00

To be discounted to present worth at 4% [Ans. 11] .....$ 22,021.00

$22,021 ÷ 240 months equals $91.75 per month.

TOTAL ITEM IV-B—20 year factor at 4%—166.057 [Ex. 9] x $92.00 equals.....$ 15,277.00

That is to say, $15,277.00 invested on May 1, 1963, will produce $22,021.00 at the rate of $92.00 per month over the next 20 years, at which time both principle and interest will be exhausted.

TOTAL ITEMS IV-*A* and IV-*B*—$ 20,802.00

ITEM V

ITEM I.....$ 35,095.00
ITEM II.....$ 77,199.00
ITEM III.....$ 33,542.00
ITEM IV.....$ 20,802.00
TOTAL $166,638.00

4% annual income [Ans. 11].....$ 6,665.00
11% annual income tax thereon [Ans. 9]..$ 733.00
Monthly requirement .....$ 61.00

$61.00 divided by two because of depleting nature of principle of the fund.....$ 30.50

TOTAL OF ITEM V—20 yr. factor at 4% [Ex. 9]—166.05 x $30.50.....$ 5,064.00

That is to say, $5,064.00 invested on May 1, 1963 at four per cent per annum will produce $30.50 per month for the next 20 years, at which time both the principle and interest will be exhausted.

SUBTOTAL OF ITEMS I, II, III, and IV $166,638.00
PLUS ITEM V..... $ 5,064.00
TOTAL NOLLENBERGER AWARD $171,702.00*
R. (Nollenberger) 508-512.

MATLOCK

ITEM I

Earnings after death to date, i.e., 4/21/58 to 5/1/63 ..... $ 54,765.00

Minus 25% [Ans. 7],** 16.6% [Ans. 8] and 6-1/2% contribution to pension equals 48.1%, which leaves 51.9% of $54.765.00 as contribution to family for above period.. $ 28,423.00
$28,423 ÷ 5 years equals $5,685 annually. Interest on each annual total of $5,685 compounded annually at 4% [Ans. 11] from one year after death to 5/1/63..... $ 2,361.00
TOTAL OF ITEM I..... $ 30,784.00

ITEM II

Ans. 4 - Total earnings during work expectancy of 20 year [Ans. 3] $319,014.00

Minus earnings in 5 years from death to date, i.e., 4/21/58 to 5/1/63..... $ 54,765.00

Earnings during 15 year remainder of Work expectancy $264,249.00

Minus 25% [Ans. 7], 16.6% [Ans. 8] and 6-1/2% contribution to pension, i.e.,

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*Being the amount of the Nollenberger judgment as entered.

**Reference is here made to the jury's answer to Special Interrogatory 7. Similar references throughout the Court's computations are to the answer of the jury to other Special Interrogatories.

48.1% which leaves 51.9% of $264,249.00 as contribution to family for balance 15 years (180 months) from 5/1/63, viz.....$137,145.00

$137.145.00 ÷ 180 months is monthly contribution to family of .....$ 762.00

15 year factor (Ex. 9) from 5/1/63 at 4% [Ans. 11] is 135.85 x 762.00 equals....$103,518.00

TOTAL OF ITEM II.....$103,518.00

That is to say, $103,518 invested today (May 1, 1963) at four per cent will produce $137,145, at the rate of $762 per month for the next 15 years, at which time both the principle and the interest will be exhausted.

ITEM III

Ans. 5 - Total pension $111,120.00

Minus 25% [Ans. 7] and 16.6% [Ans. 8], i.e., 41.6% leaves 58.4% of $111,-120.00 as contribution to family.....$ 64,894.00

$64,894 to be discounted to present worth as follows: $64,894 ÷ 120 months [10 yrs. life expectancy after work expectancy, Ans. 2 and 3] equals monthly contribution to family of.....$ 540.00

Discount factor (Ex. 9) at 4% [Ans. 11] is 55.02. [Pension not being due until 15 years from now (5/1/63) and payable for 10 years, discount factor is secured by subtracting 15 year factor of 135.8494 from 25 year factor of 190.8775 (25 yrs. being reminder of life expectancy of decedent .....

TOTAL ITEM III - 540 x 55.02 equals .....$ 29,710.80

That is to say, $29,710 invested as of 4/1/63 at four per cent will produce $64,894.00 at the rate of $540.00 per month for a 10 year period begining 15 years from now, at the end of which time both the principle and the interest will be exhausted.

ITEM IV

Total value [Ans. 6] of personal services of decedent to plaintiffs over decedent's life expectancy of 30 years [Ans. 2] which averages $1,500 a year	$ 45,000.00
A - From death to 5/1/63 at $1,500 (5 yrs)	$ 7,500.00
Interest at 4% [Ans. 11] compounded annually on each annual sum of $1,500 from one year after death to 5/1/63, plus 1% inflation [Ans. 10] i.e., 5%, equals	$ 788.00
TOTAL ITEM IV-A	$ 8,288.00
B - Total for 25 years from 5/1/63 to end of life expectancy [Ans. 2] i.e., $7,500 for 5 years from death to date subtracted from $45,000 equals	$ 37,500.00
Add inflation of 1% per year [Ans. 10] on $1,500 annually for 25 years equals	$ 4,871.00
	$ 42,371.00
TOTAL IV-B, present worth of $42,371 at 4% [Ans. 11] for 25 years (300 months) at $141.00 per month x 190.87 [Ex. 9] equals	$ 26,913.00
Plus TOTAL IV-A	$ 8,288.00
TOTAL ITEM IV	$ 35,201.00

ITEM V

ITEM I	$ 30,784.00
ITEM II	$103,518.00
ITEM III	$ 29,710.00
ITEM IV	$ 35,201.00
TOTAL	$199,213.00
4% annual income [Ans. 11]	$ 7,968.00
13% annual income tax thereon	$ 1,036.00
Monthly requirement	$ 86.00
$86 divided by two because of depleting nature of the principal of the fund	$ 43.00
25 yr. factor [30 (Ans. 2) minus 5 years gone by] at 4% [Ans. 11] is 190.87	
TOTAL ITEM V - 190.87 x $43.00	$ 8,207.00
SUB-TOTAL OF ITEMS I, II, III, IV	$199,213.00
TOTAL MATLOCK AWARD	$207,420.00*

R. (Matlock) 561-565.

We regret that the need for these clarifications has arisen and trust that no inconvenience to any of you has resulted therefrom. We are forwarding copies of this letter to the Court of Appeals and it is our intention to append a copy of the same to our closing brief herein in order that the briefing record may reflect the clarifications hereby called to your attention.

With my kindest regards to you all, I remain

Sincerely yours,

/S/ PIERCE WORKS
of O'MELVENY & MYERS

*Being the amount of the Matlock judgment as entered.